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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
	)	
TO: The Commission	)	

REPLY COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER") by its attorneys respectfully submits, pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. Section 1.415, the following Reply Comments in response to comments filed by interested parties in the above captioned Notice of Proposed Rule Making.

NABER submitted comments in this proceeding urging the Commission to adopt the position outlined in the industry White Paper presented by Emmett B. Kitchen, President of NABER, addressed to the NABER membership and its six (6) separate membership sections. In determining the types of like regulation for similar classes of mobile service providers, the Commission was urged to exercise the maximum degree of forbearance of its Title II authority except for those certain limited CMS providers which may have obtained, either through significant spectrum holdings or market place economics, a dominant position in the market place.

Taking into consideration such an approach, the White Paper suggested that the CMS classification should be further divided into two (2) separate sub-groups. For lack of a better term, the White Paper suggested that CMS providers be divided into Commercial 1/Open Entry and Commercial 2/Limited Entry classes. In so doing, the White Paper concluded that the Commission will be better able to apply Congress' finding that market conditions justify differences in the regulatory treatment of some providers of commercial mobile services. The sub-grouping would also make clear that most carriers would not be subject to significant Title II or other unnecessary regulatory interference and thereby reduce the need for a legalistic fight over which classification a particular carrier is to fit in if made on a case by case basis.

It is NABER's view, as expressed in its comments, that systems which are operated substantially on a non-profit basis or are not principally engaged for-profit to third party customers not be considered within the Commercial Mobile Service definition. It was also NABER's position that for-profit service on an ancillary or secondary basis should not necessarily convert a private mobile service licensee into a commercial mobile service provider. The suggestion being that the Commission should look to the primary activity of the system and not to any ancillary or secondary undertaking which is used to allow the licensee to more efficiently or economically operate its communications system.

NABER did conclude that private carrier paging systems should be considered CMS providers by definition. It also urged that ESMR

providers be included in the CMS classification and, in an effort to move away from case by case interpretations which could continue to burden the resources of the Agency and the industry, NABER proposed that those SMR operators that provided for-profit interconnection service also be considered CMS providers. These positions were premised on the assumption that the Commission will substantially forbear from Title II regulation and preempt the States from rate and entry regulation.

The NABER comments also supported a grand-fathering for three (3) years of the dispatch prohibition on common carrier services. Further, NABER urged the provision of equal access interconnection for commercial mobile service providers and for private systems. It was NABER's view that the Commission should mandate equal access rights for interconnection which are currently afforded to Part 22 licensees which should equally be applicable to all commercial mobile service providers. NABER believes that this right should be extended to private mobile service licensees so that they may make certain that their level of interconnection does not act as an economic disincentive to the operation of their systems.

NABER's position in this proceeding is a recognition that the rapid development of the wireless industry mandates that regulatory impediments be removed and not impede technology nor the delivery of wireless services to the public. NABER's position is based upon the premise that the amendments to the Communications Act not only called for parity amongst similar types of comparable and competitive services to be treated consistently with respect to

their regulatory rights and obligations, but was founded on a clear mandate that the Commission, in its determination, forbear from Title II regulatory requirements and that there be preemption over state regulation.

Accordingly, it is NABER's view that the Commission can resolve most definitional issues by creating two (2) categories of Commercial Mobile Service, classified in the White Paper as Commercial 1/Open Entry and Commercial 2/Limited Entry whereby it may use characteristics of market size, market share or spectrum size as an indication for regulation for a limited number of carriers and whereby carriers such as PCPs and interconnected SMRs would be governed under a substantially deregulated format.

A review of the extensive comments filed in this proceeding by Associations[1], Bell Operating Companies[2], Private Carrier Paging companies[3], SMR and ESMR providers[4], manufacturers[5] and users[6] generally demonstrate that most parties recognized Congress'

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[1] See, e.g. Comments of American Telecommunications Association, Inc. and Cellular Telecommunications Industry Association.

[2] See, e.g. Comments of The Bell Atlantic Companies, Bell South, Ameritech, PacTel Corporation and NYNEX Corporation.

[3] See, e.g. Comments of Arch Communications Group, Inc., Pagemart, Inc., Paging Network, Inc., PacTel Paging and Denton Enterprises, Inc.

[4] See, e.g. Comments of Cencall Communications Corporation, Nextel, Geotek Industries, Inc. and RAM Mobile Data.

[5] See, e.g. Comments of Motorola and E.F. Johnson Company.

[6] See, e.g. Comments of Aeronautical Radio, Inc.

mandate for clarity and for consistency in regulatory treatment in the Amendment to the Communications Act adopted in the Omnibus Budget Reconciliation Act of 1933 (the "Budget Act"). Further, it is clear that with the exception of the State Public Utility Commissions, the vast majority of all of the parties filing reiterated the need for substantial forbearance from Title II regulations for CMS providers and for federal preemption of state rate and entry regulations.

I. The Comments Demonstrate Substantial Support For Classification of Private Carrier Paging Systems As Commercial Mobile Service Providers

Companies as diverse as Nextel[7], Motorola[8], PageNet[9], CTIA[10], PacTel Paging[11] and Arch Communications Corp.[12] recognized that the continued utilization of the "store and forward" technical rationale applied to private carrier paging systems to determine whether or not a system is interconnected is not applicable under the new legislation and PCP carriers should be considered as CMS providers. As stated by Paging Network, Inc., "...[A]ll mobile services which either originate or terminate on the public switch network are interconnected for purpose of Section 332(d)...[T]his

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7 Nextel Comments at p. 16.

8 Motorola Comments, Appendix A.

9 PageNet Comments at p. 5.

10 CTIA Comments at p. 9.

11 PacTel Paging Comments.

12 Arch Communications Corp. Comments at p. 7.

view both is consistent with Congressional intent and comports with long-standing FCC precedents defining interconnected services.[13]

Although a number of parties supported the view that private carrier paging systems based on "store and forward" technology and prior Commission precedent should be classified as private mobile service providers[14], it is NABER's view that this interpretation is not necessary and is based in part on uncertainty as to the degree of forbearance from the Title II regulation which PCP systems as CMS providers will be subject. It is NABER's position that a primary basis for regulatory parity was that the Congress mandated less burdensome regulations by the Commission on private carriers which may, under the new legislation, be classified as CMS providers. In this respect, NABER recognizes the history of the prior case law involving "store and forward" technology and the arguments which can be raised in asserting that PCP systems should be classified as private mobile systems. However, such case law does not overcome the intent of the new legislation which requires that carriers providing comparable competitive service be regulated in a like manner. Taking into account such a rationale, there would not be parity if PCP operators were treated differently than radio common carrier licensees which would be considered CMS providers.

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[13] PageNet comments at pps. 5 and 6.

[14] See, e.g. Comments of Pagemart, Inc.

II. Commercial and Private Mobile Service Providers Should Have Equal Interconnection Rights

NABER is in full support with the comments filed by those parties urging equal access to interconnection rights. As stated in the Joint Comments of CelPage, Inc., Network U.S.A., Denton Enterprises, Copeland Communications and Electronics, Inc. and Nationwide Paging[15] although radio common carriers and private interconnected services such as PCPs have, in the past, been regulated under different Commission rules, both types of licensees require identical form of telephone services to provide their customers an interconnected paging or two-way mobile service. The FCC, through a series of policy statements and declaratory rulings, has regularly exercised its jurisdiction over interconnection matters to insure that interconnection to the PSTN will be provided by the wireline telephone companies on fair and reasonable terms. Accordingly, there should be no exception for equal entitlement to interconnection whether or not a system is commercial or a private mobile service. There is no basis to treat private carriers differently from common carriers for interconnection purposes and the Commission should clarify and make certain that those types of expenses where private carriers in the past had to petition and fight the local exchange carrier for equal access treatment should not continue.

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[15] Joint Comments of Celpage, Inc., Network USA, Denton Enterprises, Copeland Communications and Electronics, Inc. and Nationwide Paging at pps. 3-5.

III. The Commission Should Grandfather the Dispatch Prohibition on Common Carriers for Three (3) Years

In its comments, NABER proposed that the dispatch prohibition applicable to cellular operators or common carrier licensees that are subsequently classified as commercial mobile service providers continue for a three (3) year transition period to parallel the required phase in period provided for private systems reclassified as CMS providers. This view was supported by a number of parties recognizing the phase in period and the need that there not be disruption to existing private mobile radio operators immediately caused by the new legislation. Nextel in its Comments, for instance, stated that,

> "Revised Section 332 provides a three-year transition period for reclassified private carriers to remain under private mobile service regulation as they reorder their operations consistent with common carrier regulatory obligations. The Commission has been directed to eliminate technical requirements currently imposed on private carriers that are not applicable to functionally equivalent common carriers. Eliminating the prohibition during this transition would be inconsistent with the revised Act. In addition, private carriers would be subjected to competition in the traditionally private land mobile dispatch market prior to creating regulatory parity and at the same time that they are attempting to adjust to the regulatory and competitive challenges of offering commercial mobile service."[16]

NABER supports this view and urges the Commission to adopt such a three (3) year phase-in period before it lifts the current dispatch prohibition.

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[16] Nextel Comments at p. 19.

IV. The Commission Should Avoid a Classification Mechanism Which Would Result in a Confusing Case by Case Process

NABER recognizes that the language of the Conference Report[17] reflects the ability of the Commission to differentiate between Enhanced SMRs (ESMR) and other wide-area and traditional SMRs which offer interconnected service to the public. In this respect, it can be cogently argued that the service offering of such traditional SMR operators is not the "functional equivalent" of cellular as such systems do not offer the same spectrum capacity because they do not offer channel or frequency reuse. Further, it can be argued that the Commission is not necessarily limited to the example in the Conference Report and that the "functional equivalent" test could be applied on a case by case basis.

The position taken in this proceeding by NABER as set forth in the White Paper emphasized the need for the Commission to avoid a case by case approach and to allow competition to be the key element in deciding the degree of regulation imposed. As stated by Emmett B. Kitchen, President of NABER in the White Paper:

> "For example, some commercial mobile services, such as cellular, ESMRs and soon PCS are generally voice-based services that use broadband spectrum. These services enjoy significant market share and therefore, limited competition. Conversely, other commercial mobile services, such as paging and for-profit two-way radio, occupy limited spectrum and experience significant competition.
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> These real-world market conditions suggest that the commercial mobile services industry can essentially be divided into two classes. I simply call these classes:

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[17] H.R. Rep. No. 213, 103rd Cong., 1st Sess. 496, reprinted in 1993 U.S.C.C.A.N. 1088.

> Commercial 1/Open Entry and Commercial 2/Limited Entry. Under this scenario, the criteria for delineation between these two subgroups would be based either in terms of the amount of spectrum used by a licensee in a given market or based on the relative percentage of available spectrum licensed to a particular provider. I believe that Congress recognized these distinct market realities when it stated that 'market conditions may justify differences in the regulatory treatment of some providers of Commercial Mobile Services.'"

Under NABER's approach, the Commercial 1/Open Entry class of CMS provider would be subject to little regulatory difference to that currently found governing a traditional SMR that offers interconnected service for profit to the public. This regulatory proposal is an attempt by NABER, (after having been an active participant in the radio common carrier/private carrier battles), to view the new legislation as an opportunity for the Commission and the industry to act in a sweeping context to fashion a regulatory scheme which will remove the need for such case by case maneuverings and to allow CMS providers such as PCP systems and SMRs to compete without unnecessary regulation. If this is not the result of the recent amendments to the Act, then the Commission will have failed to serve the needs of a significant portion of communication providers and their customers and the industry will have missed the opportunity to provide a regulatory format which will foster the rapid development and use of wireless technology in a competitive market environment.

V. Conclusion

WHEREFORE, the National Association of Business and Educational Radio, Inc. hereby respectfully requests that the

Commission consider the above-said reply comments and act in a manner in accordance with the views expressed herein.

Respectfully submitted,
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

By: _____
David E. Weisman, Esquire

By: _____
Alan S. Tilles, Esquire
Its Attorneys
Meyer, Faller, Weisman and
Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
(202) 362-1100

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sl\naber\parreply.com